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Federal Tort Claims Act

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VII. Actions Under Federal Tort Claims Act

B. Res Judicata and Preclusion of Double Recovery

§ 143. Res judicata and preclusion of double recovery in action against government employee, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [United States](#)  953, 956

A judgment in a civil action under the Federal Tort Claims Act (FTCA) constitutes a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the federal government whose act or omission gave rise to the claim.¹ Although some courts interpret this provision as proscribing only a double recovery, and not a suit against the federal employee in the first instance,² other courts interpret the provision as barring a subsequent suit against the individual federal employee whose act or omission gives rise to the judgment against the United States,³ including a second suit alleging a violation of constitutional claims,⁴ regardless of the outcome of the judgment.⁵ The entry of the final judgment in a FTCA action operates as a bar even though the plaintiff's ultimate recovery against the government is on narrower grounds than those alleged in the FTCA complaint.⁶

Caution:

Under the plain text of the "Exceptions" section of the FTCA, the FTCA's judgment bar provision, under which a judgment in an FTCA suit forecloses any future suit against individual employees, does not apply to cases that are based on the performance of a discretionary function,⁷ and the dismissal of an action under FTCA does not preclude a subsequent suit alleging a constitutional tort violation by the employee.⁸

The fact that a subsequent civil suit is based on some causes of action which the plaintiff did not pursue in the plaintiff's original suit against the United States is not dispositive, and the question for the court is whether the substance of claim is the same in the two suits.⁹ Where the substance of the claim is the same in the two suits, the plaintiff's action against the

defendant in his or her individual capacity is barred where the plaintiff initially brought a civil action against the United States under the FTCA for damages arising from the same alleged acts, even though the court in the prior suit found that the individual was acting outside the scope of its employment when the acts allegedly took place.¹⁰

The FTCA judgment bar on claims against federal government employees applies equally in those cases where the FTCA and non-FTCA claims are tried together in the same action as to those situations in which the claims are tried separately, and does not depend on the order in which the claims are decided.¹¹ A FTCA judgment bars a non-FTCA claim raised in the same suit,¹² and a judgment on the FTCA claim in such a suit requires the vacatur of any earlier judgment on the non-FTCA claim.¹³

Observation:

The FTCA's judgment bar rule does not bar a plaintiff's claim against a government employee after the plaintiff's FTCA action against the United States has been dismissed for a lack of jurisdiction, where such a claim could not have been brought under the FTCA, such as one based under the Racketeer Influenced and Corrupt Organizations Act.¹⁴

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Footnotes

- ¹ 28 U.S.C.A. § 2676.
- ² *Kreines v. U.S.*, 959 F.2d 834, 22 Fed. R. Serv. 3d 558 (9th Cir. 1992); *Henderson v. Bluemink*, 511 F.2d 399 (D.C. Cir. 1974).
- ³ *United States v. First Sec. Bank of Utah*, 208 F.2d 424, 42 A.L.R.2d 951 (10th Cir. 1953); *Sanchez v. McLain*, 867 F. Supp. 2d 813 (S.D. W. Va. 2011); *Turner v. Ralston*, 409 F. Supp. 1260 (W.D. Wis. 1976).
- ⁴ *Freeze v. U.S.*, 343 F. Supp. 2d 477 (M.D. N.C. 2004), *aff'd*, 131 Fed. Appx. 950 (4th Cir. 2005).
- ⁵ *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996); *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840 (10th Cir. 2005); *Freeze v. U.S.*, 343 F. Supp. 2d 477 (M.D. N.C. 2004), *aff'd*, 131 Fed. Appx. 950 (4th Cir. 2005).
- ⁶ *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840 (10th Cir. 2005).
- ⁷ §§ 192, 193.
- ⁸ *Simmons v. Himmelreich*, 136 S. Ct. 1843, 195 L. Ed. 2d 106 (2016).
- ⁹ *Andrews v. Gee*, 599 F. Supp. 251 (D.S.C. 1984).
- ¹⁰ *Andrews v. Gee*, 599 F. Supp. 251 (D.S.C. 1984).
- ¹¹ *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840 (10th Cir. 2005).
- ¹² *Unus v. Kane*, 565 F.3d 103 (4th Cir. 2009); *Harris v. U.S.*, 422 F.3d 322, 2005 FED App. 0376P (6th Cir. 2005); *Manning v. U.S.*, 546 F.3d 430 (7th Cir. 2008).
- ¹³ *Manning v. U.S.*, 546 F.3d 430 (7th Cir. 2008).

¹⁴ [Pesnell v. Arsenault](#), 543 F.3d 1038 (9th Cir. 2008) (abrogated on other grounds by, [Simmons v. Himmelreich](#), 136 S. Ct. 1843, 195 L. Ed. 2d 106 (2016)).

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